

26 CFR 601.201: Rulings and determination letters
(Also: Part I, §§ 409A; 1.409A-1)

Rev. Proc. 2008-61

SECTION 1. PURPOSE

This revenue procedure modifies and amplifies Rev. Proc. 2008-3, 2008-1 I.R.B. 110, with respect to areas in which rulings and determination letters will not be issued as to the tax consequences of arrangements described in § 409A of the Internal Revenue Code. As described below, this revenue procedure does not provide for the Service to issue rulings on the application of § 409A to nonqualified deferred compensation plans, but does provide for the issuance of rulings in other areas with respect to compensation plans that may covered by § 409A.

SECTION 2. BACKGROUND

.01 Section 5 of Rev. Proc. 2008-3 lists specific areas for which the Internal Revenue Service (Service) temporarily is not issuing rulings and determinations because those matters are under study.

.02 Section 3.01 of Rev. Proc. 2008-3 reflects those areas in which rulings or determination letters will not be issued with respect to specific questions and problems.

.03 Section 5.08 of Rev. Proc. 2008-3 provides that the Service will not rule on the tax consequences of arrangements described in § 409A, including rulings as to whether an arrangement is an arrangement described in § 409A.

.04 Section 409A provides certain requirements applicable to nonqualified deferred compensation plans. If a plan does not meet those requirements, participants in the plan are required to immediately include amounts deferred under the plan in income and pay additional taxes on such income.

.05 The Treasury Department and the Service have issued final regulations under § 409A (72 Fed. Reg. 19234 (April 17, 2007)). The final regulations apply to taxable years beginning on or after January 1, 2009. Rev. Proc. 2007-86, 2007-46 I.R.B. 990. The final regulations define the terms nonqualified deferred compensation plan and deferral of compensation for purposes of § 409A. See § 1.409A-1(a) & (b).

.06 Since publication of the final regulations, the Treasury Department and Service have issued Notice 2007-100, 2007-52 I.R.B. 1243, providing transitional relief and guidance on the correction of certain failures of a nonqualified deferred compensation plan to comply with § 409A in operation. Section V of Notice 2007-100 requests comments on all aspects of a potential corrections program in which taxpayers could correct certain failures to comply with § 409A(a) in the operation of a nonqualified deferred compensation plan.

.07 Based on experience with the private letter ruling program, the Service has determined that section 5.08 of Rev. Proc. 2008-3 unnecessarily restricts the ability of the Service to issue private letter rulings under Rev. Proc. 2008-1, 2008-1 I.R.B. 1

and Rev. Proc. 2008-4, 2008-1 I.R.B. 121. For example, the existing no-rule policy prevents the Service from issuing private letter rulings with respect to estate and gift tax consequences of proposed inter vivos or testamentary transfers of rights under nonqualified deferred compensation plans, even though such issues do not directly involve the application of § 409A. Also, the Service has been unable to issue private letter rulings concerning issues arising under the Federal Insurance Contributions Act (FICA) with respect to nonqualified deferred compensation.

.08 In light of the final regulations becoming applicable on January 1, 2009, and the issuance of Notice 2007-100, the Service has decided to modify and amplify Rev. Proc. 2008-3. The Service will continue not to issue rulings concerning the income tax consequences of establishing, operating, or participating in a nonqualified deferred compensation plan described in § 409A, but the Service generally will rule on the application of certain other tax law provisions (such as FICA and estate and gift taxes) to taxpayers who participate in those plans. Specifically, rulings will not be issued with respect to the following: the income tax (including income tax withholding) consequences of establishing, operating, or participating in a nonqualified deferred compensation plan as defined in § 1.409A-1(a); whether a plan is described in § 1.409A-1(a)(3)(iv) (certain plans subject to a totalization agreement and similar plans) or § 1.409A-1(a)(3)(v) (certain broad-based foreign retirement plans); whether a plan is a bona fide vacation leave, sick leave, or compensatory time plan described in § 1.409A-1(a)(5); and whether a plan provides for the deferral of compensation under § 1.409A-1(b) (including whether an amount is a short-term deferral and whether certain

stock rights, foreign plans, and separation pay plans are subject to § 409A).

SECTION 3. PROCEDURE

Rev. Proc. 2008-3 is modified by deleting section 5.08. Rev. Proc. 2008-3 is amplified by adding the following to section 3.01:

Section 409A.—Inclusion in Gross Income of Deferred Compensation Under Nonqualified Deferred Compensation Plans.—The income tax consequences of establishing, operating, or participating in a nonqualified deferred compensation plan within the meaning of § 1.409A-1(a); whether a plan is described in § 1.409A-1(a)(3)(iv) or (v); whether a plan is a bona fide vacation leave, sick leave, or compensatory time plan described in § 1.409A-1(a)(5); and whether a plan provides for the deferral of compensation under § 1.409A-1(b).

SECTION 4. EFFECT ON OTHER REVENUE PROCEDURES

Rev. Proc. 2008-3 is modified and amplified.

SECTION 5. EFFECTIVE DATE

This revenue procedure applies to rulings and determination letters issued after September 25, 2008.

DRAFTING INFORMATION

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